

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 20,886-s76H BY WILBUR J.)
HENSLE)

FINAL ORDER

The Proposed Findings of Fact, Conclusions of Law and Order as entered by the Hearing Examiner on February 8, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order.

FINAL ORDER

Application for Beneficial Water Use Permit No. 20,886-s76H, by Wilbur J. Hensler, is hereby denied.

NOTICE

This Final Order may be appealed in accordance with the Montana Administrative Procedures Act, by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

Forrest Tevebaugh, Hearing Examiner at the time of the Hearing, has resigned and is no longer available to the Department. This Proposed Order was prepared by the undersigned who has listened to the entire transcript of the hearing, and read the Department's complete file on this matter.

DATED this 26th day of February, 1980.

David L. Pengelly
DAVID L. PENGELLY, D. N. R. & C.
HEARING EXAMINER

CASE # 20886

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 20,886-s76H BY WILBUR J.)
HENSLE)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on September 6, 1979, in the Missoula County Courthouse Annex, Room 201, Missoula, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit No. 20,886-s76H. Forrest Tevebaugh, Hearing Examiner, presiding.

The Applicant, Wilbur J. Hensler, appeared at the hearing and presented testimony in support of the Application. Mr. Hensler was not represented by legal counsel. No exhibits were introduced supporting the Application.

Three Objectors attended the hearing and presented testimony and statements. The Objectors were J. Carter Mason, Lloyd James testifying for Mrs. Edgar James, and Dale Blackler. The Objectors were not represented by legal counsel. Mr. James introduced one (1) exhibit supporting Mrs. James' objections, to wit:

OBJECTOR'S EXHIBIT:

O-1 Five sworn Affidavits testifying to the period of use of the waters of Dry Gulch by Mr. Edgar James.

The Objector's Exhibit was marked accordingly and received into the record without objection.

Testifying on behalf of the Montana Department of Natural Resources

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1 and Conservation were Larry Brown, Hydrologist; Arlin Krogstad, Hearing
2 Representative; and Jan Mack, Missoula Water Rights Bureau Field Office
3 Manager. Also present was Vicki Woodrow, Hearing Recorder. The
4 Department was not represented by legal counsel. No exhibits were
5 introduced by the Department.

7 SUMMARY OF RECORD

8 1. On October 31, 1978, the Department received an Application for
9 Beneficial Water Use Permit No. 20,886-s76H by Wilbur J. Hensler to
10 appropriate 3 gallons per minute of water, not to exceed 4.84 acre-
11 feet per annum from Dry Gulch, a tributary of the Bitterroot River in
12 Ravalli County, Montana. Water is to be impounded in an enlarged
13 existing 1 acre-foot reservoir with a new capacity of 5.84 acre feet
14 at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 22, Township 10 North,
15 Range 19 West, M.P.M., and used for wildlife purposes from January 1
16 to December 31, inclusive, of each year.

17 2. On January 31, February 7 and 14, 1979, the Department caused
18 to be duly published in the Ravalli Daily Republic, Hamilton, Montana,
19 notice of the above Application for Beneficial Water Use Permit No.
20 20,886-s76H.

21 3. On June 13, 1979, the Application was revised downward to
22 read, ". . . to appropriate 3 gallons per minute of water, not to
23 exceed 2.48 acre-feet per annum from Dry Gulch, a tributary of the
24 Bitterroot River in Ravalli County, Montana. The water is to be
25 impounded in an enlarged existing one (1) acre-foot reservoir with
26 a new capacity of 2.48 acre-feet."

27 4. On February 21, 1979, the Department received an objection to
28 the above Application from Mrs. Edgar James.

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1 5. On March 16, 1979, the Department received an objection to
2 the above Application from Mr. C. D. Shook.

3 6. On March 21, 1979, the Department received an objection to
4 the above Application from J. Carter and Irma Mason.

5 7. On March 26, 1979, the Department received an objection to
6 the above Application from Mr. Dale Blackler.

7 8. The Applicant, Wilbur Hensler, testified at the hearing that
8 he wants to improve an existing reservoir for stock water and wildlife
9 use. Mr. Hensler stated that he does not believe that the dam restricts
10 the flow of water down Dry Gulch; therefore, he really isn't using the
11 water. He feels that there is water available in Dry Gulch for appropria-
12 tion. Mr. Hensler stated that the existing reservoir appears on maps
13 15 and 20 years old. Mr. Hensler also stated that the way the reservoir
14 is currently built, it cannot bypass water to downstream users until it
15 is full. Mr. Hensler feels that the use of the water would be beneficial
16 for any wildlife that might happen to come through the area.

17 9. The Hearing Examiner read into the record the four (4) objections
18 stated by C. D. Shook on his objection to this Application. These
19 objections are:

20 "a. Exposure to property damage by possible unplanned release
21 due to failure of reservoir.

22 b. Appropriation of additional water for wildlife use. I
23 believe availability of water along Dry Gulch is more
24 desirable than enlarged reservoir. I judge existing
25 reservoir is sufficient for wildlife.

26 c. Possible affect on existing water rights.

27 d. I believe it is necessary to provide an environmental impact
28 review to determine effect of reservoir enlargement on
property below Mr. Hensler's and on wildlife."

1 The Hearing Examiner ruled that only objection "c", the possible effect
2 on existing water rights, was a valid objection and only that objection
3 would be considered in making the decision on this matter.

4 10. Objector, Dale Blackler, stated that he has a filed right
5 with a priority date of 1914 that he uses to irrigate 40 to 50 acres
6 of pasture. He feels that the enlarged pond will harm his rights due
7 to evaporation of water from the pond and, because water will not run
8 down Dry Gulch for his use. Mr. Blackler also stated that there has
9 been less water since 1977 when the pond was enlarged, although there
10 was sufficient water in 1978. Mr. Blackler stated that approximately
11 three (3) out of every 10 years he does not have enough water for his use.

12 11. Lloyd James, testifying for Mrs. Edgar James, stated that he
13 feels existing rights along Dry Gulch should be protected. Mrs. Edgar
14 James has a 1933 filing for all seepage and waste water arising in
15 Dry Gulch. Mr. James also stated that the pond has fouled up some
16 springs that were used for irrigation on the James property. Currently
17 the James property is irrigated by a sprinkler irrigation system that
18 has been in use for three (3) years. The James' use Bitterroot
19 Irrigation District (B. R. I. D.) water plus Dry Gulch water.

20 12. Objector, J. Carter Mason, testified that he objects to the
21 reservoir for the same reason as Mr. James; he feels existing rights
22 should be protected, and the presence of the dam will have an adverse
23 affect on flow of water down Dry Gulch. Mr. Mason testified that he
24 has a 1943 right for 10 miner's inches and a 1945 right for 600 miner's
25 inches in Dry Gulch. Mr. Mason sprinkle irrigates 20 acres and flood
26 irrigates approximately 30 acres when the water is available. Mr. Mason
27 stated that five (5) out of 10 years he does not have sufficient water
28 for his needs.

1 13. Larry Brown, Department Hydrologist, testified that there are
2 more than 7 cubic feet per second already appropriated from Dry Gulch
3 and that these appropriations are far in excess of all but extreme
4 events occurring in this watershed. Mr. Brown further stated, however,
5 that the water the Applicant is seeking to appropriate is very small
6 in comparison to the total production of the watershed. Mr. Brown
7 also testified that although the amount of the requested appropriation
8 is small, it may possibly have an adverse affect on downstream appropriators.

9 14. Jan Mack, Missoula Water Rights Bureau Field Office Manager,
10 testified that on April 18, 1979, the reservoir was 1/3 to 1/2 full,
11 and 200 feet below the dam there was no seepage in Dry Gulch. The
12 water was first visible in Dry Gulch approximately 500 feet below the
13 dam. On May 31, 1979, the pond was full to capacity, and some seepage
14 was present in Dry Gulch immediately below the dam. It should be noted
15 that the B. R. I. D. Canal was turned on May 1, 1979. Jan Mack feels
16 that the reservoir is filled by seepage from the B. R. I. D. Canal;
17 and then seeps from the reservoir and arises in Dry Gulch.

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19 PROPOSED FINDINGS OF FACT

20 1. That the primary source of water for this Application is
21 seepage from the B. R. I. D. canal.

22 2. That the waters of Dry Gulch including seepage waters from the
23 B. R. I. D. canal are fully appropriated except during extreme runoff
24 events.

25 3. That unappropriated waters are not available throughout the
26 period during which the Applicant seeks to appropriate water.

27 4. That the appropriation of additional water by the Applicant
28 may adversely affect prior appropriators.

1 5. That the use of water for wildlife purposes is a beneficial
2 use. The Applicant claims an existing right for a one (1) acre-foot
3 reservoir, however, there was no showing that an appropriation of an
4 additional 1.48 acre-feet would be beneficial for wildlife purposes.

5 6. That the proposed means of diversion and construction are
6 inadequate. The Applicant has diverted more than three (3) gallons
7 per minute, the flow rate stipulated on the Application. On April
8 18, 1979, the reservoir was 1/3 to 1/2 full; on May 31, 1979, it was
9 full. Thus the reservoir was filled at a minimum rate of 6.5 gallons
10 per minute. There were no plans or specifications presented to show that
11 the Applicant would restrict the rate of appropriation to three (3)
12 gallons per minute, or less. The existing design of the reservoir does
13 not allow water to flow down Dry Gulch to satisfy prior water rights
14 until the reservoir is completely full. Thus the Applicant must appro-
15 priate 2.48 acre-feet of water before allowing water to pass down Dry Gulch.

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17 PROPOSED CONCLUSIONS OF LAW

18 1. Section 85-2-311, MCA, 1979, provides that the Department shall
19 grant a permit if the following criteria are met:

- 20 "1. there are unappropriated waters in the source of supply;
21 a. at times when the water can be put to the use proposed
22 by the applicant;
23 b. in the amount the applicant seeks to appropriate; and
24 c. throughout the period during which the applicant seeks
25 to appropriate, the amount requested is available;
26 2. the rights of prior appropriator will not be adversely affected;
27 3. the proposed means of diversion or construction are adequate;
28 4. the proposed use of water is a beneficial use;

1 5. the proposed use will not interfere unreasonably with other
2 planned uses or developments for which a permit has been
3 issued or for which water has been reserved; . . ."

4 2. It is concluded that there are no unappropriated waters
5 available which the Applicant may appropriate without adversely affecting
6 downstream rights.

7 3. It is concluded that the proposed means of diversion or
8 construction are inadequate.

9
10 PROPOSED ORDER

11 1. Application for Beneficial Water Use Permit No. 20,886-s76H
12 by Wilbur J. Hensler, is hereby denied.

13
14 NOTICE

15 This Proposed Order is offered for the review and comment of all
16 parties of record. The review and comment period shall commence with
17 the mailing of this Proposed Order and shall end fifteen (15) days
18 thereafter. No extensions of time for comment will be granted.

19 The Final Order in this matter will be sent to all parties by
20 certified mail.

21 The Hearing Examiner's Final Order may be appealed in accordance
22 with the Montana Administrative Procedures Act, by filing a petition
23 in the appropriate court within thirty (30) days after service of the
24 Final Order.

25 Forrest Tevebaugh, Hearing Examiner at the time of the Hearing, has
26 resigned and is no longer available to the Department. This Proposed
27 Order was prepared by the undersigned who has listened to the entire
28

1 transcript of the hearing, and read the Department's complete file
2 on this matter.

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4 DATED this 8th day of February, 1980

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6 David L. Pengelly
7 DAVID L. PENGELLY, D. N. R. & C.
8 HEARING EXAMINER
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